

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition: 89-029-15-1-4-00811-16
Petitioner: Veer Brothers Inc. (Kirpal Singh Gill – President)
Respondent: Wayne County Assessor
Parcel: 89-16-36-410-301.000-030
Assessment Year: 2015

The Indiana Board of Tax Review (Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated its 2015 assessment appeal with the Wayne County Assessor on September 8, 2015.
2. On March 4, 2016, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued its determination lowering the assessment, but not to the level requested by the Petitioner.
3. The Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board, electing the Board's small claims procedures.
4. The Board issued a notice of hearing on November 3, 2016.
5. Administrative Law Judge (ALJ) Joseph Stanford held the Board's administrative hearing on December 12, 2016. He did not inspect the property.
6. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent. Wayne County Assessor Betty Smith-Henson, Wayne Township Assessor Timothy G. Smith, and Bradley Berkemeier of Nexus Group were sworn as witnesses for the Respondent.

Facts

7. The commercial property under appeal includes a convenience store, gas station, fast-food restaurant, and a non-functioning car wash located at 5801 National Road East in Richmond.
8. The PTABOA determined a total assessment of \$851,100 (land \$180,000 and improvements \$671,100).
9. At the hearing, the Petitioner requested a total assessment of \$339,800.

Record

10. The official record for this matter is made up of the following:

- a) Form 131 with attachments,
- b) A digital recording of the hearing,
- c) Exhibits:¹

Petitioner Exhibit 1:	Subject record card,
Petitioner Exhibit 2:	“Property Tax Assessment Appeal Report” prepared by Richard Werner (pages 28, 30-31 MARKED CONFIDENTIAL),
Petitioner Exhibit 3:	Business Tangible Personal Property Return (MARKED CONFIDENTIAL).
Respondent Exhibit C:	Sales disclosure for the subject property dated October 31, 2012,
Respondent Exhibit D:	“Inflation Calculator” from Shadow Government Statistics,
Respondent Exhibit E:	“CPI Inflation Calculator,”
Respondent Exhibit F:	Pages 2-64 and 2-65 from International Association of Assessing Officers’ (IAAO) <i>Income Approach to Valuation</i> ,
Respondent Exhibit G:	Pages 485 and 486 from <i>The Appraisal of Real Estate</i> .
Board Exhibit A:	Form 131 with attachments,
Board Exhibit B:	Notice of hearing dated November 3, 2016,
Board Exhibit C:	Hearing sign-in sheet,
Board Exhibit D:	Notice of Appearance for Brian A. Cusimano.

- d) These Findings and Conclusions.

Contentions

11. Summary of the Petitioner’s case:

- a) The property’s 2015 assessment is too high. In an effort to prove this, the Petitioner offered an analysis estimating the property’s value at \$339,800. Mr. Werner, the Petitioner’s certified tax representative, prepared the analysis by developing the cost, sales-comparison, assessment-comparison, and income capitalization approaches to

¹ The Respondent did not introduce Respondent’s Exhibits A or B.

- value.² Ultimately, Mr. Werner assigned “all of the weight” on the income capitalization approach to value. Mr. Werner argued the current assessment is “double what an individual could buy the piece of land and build the [improvement], and that violates real estate’s principle of substitution.” *Werner argument; Pet’r Ex. 2.*
- b) Mr. Werner first developed a cost approach to value, even though he ultimately did not rely on it. First, he attempted to examine local land values but was unable to find any relevant sales in the area. Mr. Werner concluded the Respondent’s current land valuation of \$180,000 was correct. Because he did not offer much testimony regarding the cost approach to value, it appears he computed his improvement value using generally the same methodology as the Respondent and determined an improvement value of \$201,000. His indicated value under the cost approach was \$381,000. *Werner argument; Pet’r Ex. 2.*
- c) Next, Mr. Werner developed an assessment-comparison approach. He utilized three properties in the subject property’s taxing district. The comparable properties each included a convenience store, gas station, and restaurant. Several “adjustments as per cost figures” were made to the properties to account for differences. Specifically, he adjusted for location, lot size, building size, plumbing fixtures, year of construction based on depreciation, quality, and he made adjustments based on “pavement-to-building and canopy-to-building ratio calculations.” Under this approach, the indicated value was \$339,300. While he ultimately put “no weight” in this approach, he noted the value indicated utilizing this approach is “very close” to the value indicated by the income capitalization approach. *Werner testimony; Pet’r Ex. 2.*
- d) Mr. Werner also developed a sales-comparison approach. He compared the subject property to four recent sales. Two of the sales were from Indianapolis, one was from Kokomo, and one was from Granger. Mr. Werner made adjustments to the sale prices for essentially the same items he did in the assessment-comparison approach. His indicated value under the sales-comparison approach was \$417,900. *Werner testimony; Pet’r Ex. 2.*
- e) For several reasons Mr. Werner assigned “no weight” to the sales-comparison approach. First, sales of these types of properties include personal property. For example, freezers, underground gasoline storage tanks, and gasoline pumps were included in the sales. However, only one of the comparable sales reported any personal property. Second, inventory is generally included in the sale. When the Petitioner purchased the subject property in 2007, there was approximately \$100,000 in inventory included. Finally, when purchasing these types of properties, buyers are “purchasing a business and the real estate comes with the business.” For these

² Within his analysis, Mr. Werner refers to Article 10, Section 1 of the Indiana Constitution and Ind. Code § 6-1.1-2-2, which provide for a uniform and equal rate of property assessment. Mr. Werner failed to offer any conclusion in his analysis indicating the subject property’s assessment violates those provisions, and he failed to offer any argument to that point during the hearing.

reasons, Mr. Werner determined the sales-comparison approach would not yield the most reliable value. *Werner testimony.*

- f) Finally, Mr. Werner developed an income capitalization approach for the property. According to Mr. Werner, the majority of convenience stores are not leased facilities. However, the subject property is leased.³ Therefore, Mr. Werner assigned “100% of the weight” to his income capitalization approach. *Werner testimony; Pet’r Ex. 2.*
- g) In developing the income capitalization approach, Mr. Werner examined data from 16 states to determine a rental rate. He found 11 sale listings from Pennsylvania to Oklahoma, and as far south as Texas. On that basis, he determined a rental rate for the convenience store portion of the property was \$17.75 per square foot. He developed a vacancy rate for the convenience store portion of 4.8%. The vacancy rate was based on an analysis of Richmond-area properties that included convenience stores with gasoline sales. *Werner testimony; Pet’r Ex. 2.*
- h) For the fast-food restaurant portion, Mr. Werner utilized actual rent revenue as reported on the Petitioner’s federal tax return. From an analysis of the 29 fast-food restaurants in Richmond, three of which were vacant, he computed a vacancy rate of 10.3%. *Werner testimony; Pet’r Ex. 2.*
- i) Next, Mr. Werner deducted the expenses. For replacement reserves, he based his amount on the entire cost of the building “less 20%,” but acknowledged in cross-examination that his methodology was improper. He used a management fee of 3%, and utilized actual expenses for insurance, maintenance, repairs, and professional fees. Then, using capitalization rates from “RealtyRates.com,” he settled on a final value of \$339,800. Because “100% of the weight” was placed on this approach, Mr. Werner determined the subject property should be valued at \$339,800. *Werner testimony; Pet’r Ex. 2.*
- j) The Respondent referenced a sales disclosure several times during the presentation. According to the Respondent, the subject property “sold on contract” in 2012. Because the property was actually purchased “via land contract in 2007” the sales disclosure “reflects the finalization, paying off of the contract, and actually getting title in his name.” *Werner argument (referencing Resp’t Ex. C).*

12. Summary of the Respondent’s case:

- a) The property is correctly assessed. A 2012 sales disclosure for the subject property supports the current assessment. This sales disclosure “appears to indicate” the subject property sold for \$1,050,000 on October 31, 2012. Further, the disclosure “appears to indicate” the sale was for real estate only, and that there were no “extenuating circumstances” involved in the sale. While it is “possible” the sale was a contract sale, contract sales can be indicative of market value. *Cusimano argument; Berkemeier testimony; Resp’t Ex. C.*

³ Mr. Werner conceded that even though the subject property is currently leased, no lease agreement exists.

- b) Mr. Berkemeier, of Nexus Group, performed two calculations to trend the 2012 sale price forward to the relevant assessment date. Both calculations were performed utilizing the Consumer Price Index. More specifically, Mr. Berkemeier offered a “calendar year” calculation that resulted in a March 2015 value of \$1,077,899.80. He also offered a “month-to-month” calculation that resulted in a March 2015 value of \$1,083,947.53. In performing the calculations, Mr. Berkemeier chose a “time adjustment” rather than a “market adjustment” because he “wasn’t comfortable enough with the range of market indices.” Nonetheless, the Respondent did not request that the assessment be increased to either rolled-forward value. Instead, the Respondent argued these computations indicate the current assessment should be sustained. *Cusimano argument; Berkemeier testimony; Resp’t Ex. D, E.*
- c) For many reasons, Mr. Werner’s value computation is flawed. As to Mr. Werner’s cost approach contention regarding the principle of substitution, that principle certainly exists. But Mr. Werner’s argument in this case fails to consider the land value, which is generally determined using the sales-comparison approach. And comparing “improved sales” will not generally provide an accurate indication of how much a buyer paid for the land. Mr. Werner failed to provide an independent value for the land, even though he agreed “the land is where most of the property’s value is.” *Cusimano argument; Berkemeier argument.*
- d) Mr. Werner’s assessment-comparison and sales-comparison approaches are also flawed. In his assessment comparison, his purportedly comparable properties are assessed “right in the range” of the subject property’s assessment prior to Mr. Werner’s adjustments. But in both of these approaches, his adjustments are unsupported. Mr. Werner failed to use paired-sales analyses. Further, he failed to adequately consider location, and more importantly, the traffic count. *Cusimano argument.*
- e) As to Mr. Werner’s income capitalization approach, the lease listings he utilized are from as far away as Texas and Oklahoma. These properties are not relevant here as there is no evidence of any location adjustments made. Moreover, his computation of replacement reserves does not comply with generally accepted appraisal principles. In using the entire building cost, Mr. Werner has essentially recaptured building depreciation rather than accounted for short-lived items such as HVAC and carpeting. Thus, his computation greatly overestimates expenses, and therefore underestimates the property’s value. For these reasons, the Petitioner failed to meet its burden of proof. *Cusimano argument; Berkemeier argument.*

Burden of Proof

13. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass’r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax*

Comm'rs, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as amended by P.L. 97-2014 creates two exceptions to that rule.

14. First, Ind. Code § 6-1.1-15-17.2 “applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year.” Ind. Code § 6-1.1-15-17.2(a). “Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
15. Second, Ind. Code § 6-1.1-15-17.2(d) “applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15.” Under those circumstances, “if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct.” Ind. Code § 6-1.1-15-17.2(d). This change was effective March 25, 2014, and has application to all appeals pending before the Board.
16. Here, there was no dispute the assessment decreased from \$874,400 in 2014 to \$851,100 in 2015. In fact, the Petitioner’s representative admitted the Petitioner has the burden of proof. The burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden remains with the Petitioner.

Analysis

17. The Petitioner failed to make a prima facie case for reducing the 2015 assessment.
 - a) Real property is assessed based on its market value-in-use. Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. Assessing officials primarily use the cost approach, but other evidence is permitted to prove an accurate valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles.
 - b) Regardless of the method used, a party must explain how the evidence relates to the relevant valuation date. *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For a 2015 assessment, the valuation date was March 1, 2015. *See* Ind. Code § 6-1.1-4-4.5(f).

- c) Here, the Petitioner relied on a “Property Tax Assessment Appeal Report” prepared by its tax representative, Mr. Werner.⁴ In his analysis, Mr. Werner developed four approaches to value: the cost approach, the sales-comparison approach, the assessment-comparison approach, and the income capitalization approach. While his reconciliation assigns “100% of the weight” to the income capitalization approach, the Board will examine all four approaches, beginning with the cost approach.
- d) Mr. Werner said little regarding his cost approach, but did state that the assessment is double the amount it would cost to purchase the land and build the improvements new. And this, he concluded, violates the principle of substitution.
- e) Mr. Werner’s principle of substitution claim is flawed. He failed to establish the cost of purchasing the subject property’s land and the cost of building the improvement new. In fact, he failed to provide an independent value for land, and instead only relied on the Respondent’s value. Regardless, Mr. Werner misapplied the principle of substitution. The subject property is an income-producing property; thus, potential buyers are first and foremost purchasing an income stream generated by rent. That is precisely why Mr. Werner relied solely on the income capitalization approach, and placed “no weight” on the cost approach in his estimation of value. The proper framing of the principle of substitution question as it relates to an income-producing or investment property is not whether a buyer will pay more than it costs to build the improvement new, but whether a buyer will pay more than the amount required to obtain another property having the same return on investment. *See IAAO Property Assessment Valuation*, 203 (2nd ed. 1996). Mr. Werner failed to address that question and in turn his argument and accompanying evidence lacks probative value.
- f) Next, the Board turns to Mr. Werner’s sales-comparison approach. *See 2011 REAL PROPERTY ASSESSMENT MANUAL* at 9 (incorporated by reference at 50 IAC 2.4-1-2) (stating that the sales-comparison approach relies on “sales of comparable improved properties and adjusts the selling prices to reflect the subject property’s total value.”); *see also Long*, 821 N.E.2d 466, 469.
- g) To effectively use the sales-comparison approach as evidence in a property tax appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to

⁴ The Petitioner submitted another “Property Tax Assessment Appeal Report” along with its Form 131. This report was also prepared by Mr. Werner and is dated September 4, 2015. On its face, this report looks similar to Petitioner’s Exhibit 2. However, upon further inspection the two reports are markedly different. Most importantly, the report attached to the Form 131 specifically states it was prepared in accordance with Uniform Standards of Professional Appraisal Practice (USPAP) and lists Mr. Werner’s accreditation. Petitioner’s Exhibit 2 states neither. The Board will not speculate as to why Mr. Werner did not include this crucial information in Petitioner’s Exhibit 2. Additionally, aside from the value conclusion indicated from the cost approach, the other three approaches to value yield different values when comparing the two reports. As the Petitioner did not introduce into evidence the report attached to the Form 131 nor did Mr. Werner testify to anything in the report, the Board will not place any weight on this report.

another property are not sufficient. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*

- h) While Mr. Werner did make adjustments to the sale prices of purportedly comparable properties, he failed to support those adjustments. True, Mr. Werner attempted to explain them to some extent, but, at best, his adjustments inappropriately mix elements of the cost approach and the sales-comparison approach. While his format may not differ significantly from that of a certified appraiser in an appraisal report, the appraiser's assertions are backed by his education, training, and experience. The appraiser also certifies that he complied with USPAP; thus, we can infer that the appraiser used objective data, where available, to quantify his adjustments. Here, Mr. Werner failed to provide any indication that his report complies with USPAP. Given the failure to support his adjustments, the mixing of approaches, and the lack of USPAP compliance the Board finds his sales-comparison approach is insufficiently reliable.
- i) Mr. Werner also developed an assessment-comparison approach.⁵ Indeed, parties can introduce assessments of comparable properties to prove the market value-in-use of the property under appeal. Ind. Code § 6-1.1-15-18(c)(1). However, Mr. Werner made adjustments similar to those in his sales-comparison approach that are generally unsupported and inappropriately based on cost-approach principles. Thus, the Board also finds his assessment-comparison approach to be insufficiently reliable.
- j) Finally, the Board turns to Mr. Werner's income capitalization approach. Again, Mr. Werner based his value conclusion entirely on this approach. Given that the subject property is an income-producing property, the Board is in agreement that this is likely the most relevant approach.
- k) The problem is that Mr. Werner's income capitalization approach fails to comply with generally accepted appraisal principles for several reasons. First, while Mr. Werner attempted to develop a market rent for the convenience store portion of the property, his determination of the rent rate is unreliable. To develop his rate, Mr.

⁵ Within his analysis, Mr. Werner implicitly raises the issue of a lack of uniformity and equality in the assessment. As the Tax Court explained in, *Westfield Golf Practice Center*, the focus of Indiana's assessment system has changed from the application of a self-referential set of regulations to a question of whether a property's assessment reflects the external benchmark of market value-in-use. *See, Westfield Golf Practice Center, LLV v. Washington Twp. Ass'n*, 859 N.E.2d 396, 398-99 (Ind. Tax Ct. 2007). One way to prove a lack of uniformity and equality under Article X, Section 1 of the Indiana Constitution is to present assessment ratio studies comparing the assessments of properties within an assessing jurisdiction with objectively verifiable data, such as sale prices or market value-in-use appraisals. *Id.* at 399 n.3. The taxpayer in *Westfield Golf Practice Center* lost its appeal because it focused solely on the base rate used to assess its driving-range landing area compared to the rates used to assess other driving ranges and failed to show the actual market value-in-use for any of the properties. *Id.* at 399. Here, the Petitioner did not make a showing for a change in the assessment based on lack of uniformity and equality.

Werner used properties from several other states, including Pennsylvania, Georgia, Texas, and Oklahoma. It is unclear how those rent rates are relevant to the subject property, as Mr. Werner failed to make any adjustments for location, size, or any other factor.

- l) Further, Mr. Werner used actual rent for the fast-food portion of the property, without any apparent consideration of market rent. This fact alone deprives Mr. Werner's income capitalization approach of any probative value. *See Indiana MHC, LLC v. Scott Co. Ass'r*, 987 N.E.2d 1182, 1185-1186 (Ind. Tax Ct. 2013) (stating that the petitioner's income capitalization approach, which failed to consider any market data, lacked probative value).
- m) Similarly, Mr. Werner appears to have considered only actual expenses. In fact, his computation of replacement reserves, where he considered the entire building value rather than the cost of only short-lived items, employs a methodology that Mr. Werner admits does not comport with generally accepted appraisal principles. For these reasons, the Board finds Mr. Werner's income approach to lack probative value.
- n) The Board notes that Mr. Werner, while appearing as a witness, was also acting as an advocate. In his capacity as a witness he offered his own "Property Tax Assessment Appeal Report" and arguments regarding that evidence. In his role as an advocate he offered arguments against the Respondent's evidence. By stepping well outside the bounds of a typical expert witness, Mr. Werner casts doubt on his own independence. Finally, because Mr. Werner acted both as an advocate and as a witness, the Board has serious doubts about his credibility as an independent expert. For these reasons, and the various issues previously addressed, the Board finds Mr. Werner's opinion unreliable. Consequently, the Petitioner failed to make a prima facie case that the assessment should be reduced. Where a Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-22 (Ind. Tax Ct. 2003).

Conclusion

18. The Board finds for the Respondent.

Final Determination

In accordance with these findings and conclusions, the 2015 assessment will not be changed.

ISSUED: March 13, 2017

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of the date of this notice.

The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.